BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2005-15-C

IN RE:	)
	)
Generic Proceeding to Address the	)
Appropriate Rate Classification or Rate	)
Structure for Telephone Lines Located in	)
Elevators and for Telephone Lines Located	)
In Proximity to Swimming Pools	)
_____	)

JOINT POST-HEARING BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC., HORRY TELEPHONE COOPERATIVE, THE SOUTH CAROLINA TELEPHONE COALITION, AND VERIZON SOUTH, INC.

In accordance with the directive issued by the Public Service Commission of South Carolina ("Commission") at the conclusion of the hearing in this docket, BellSouth Telecommunications, Inc. ("BellSouth"), Horry Telephone Cooperative, Inc. ("HTC"), the South Carolina Telephone Coalition ("SCTC"), and Verizon South, Inc. ("Verizon") respectfully and jointly submit this Post-Hearing Brief.[1] For decades, the Joint Intervenors and Sprint, the other local exchange carrier participating in this docket, have appropriately charged business rates for telephone lines that serve pools and elevators in condominium developments in South Carolina. As explained below, the facts of record, South Carolina court decisions, decisions from at least two other State commissions as well as the practice in at least seven Southeastern states, and the public interest all support the *status quo* of applying business rates when homeowners associations like the one at issue in

[1] For ease of reference, these entities are collectively referred to in this Brief as "the Joint Intervenors.") By separate cover, the Joint Intervenors also are submitting a Proposed Order for the Commission's consideration.

this docket purchase telephone lines at pools and elevators in the common areas of a condominium development. The Joint Intervenors, therefore, respectfully urge the Commission to enter an Order confirming that a business classification is appropriate for these types of lines.

I. BACKGROUND

The issue before the Commission is the appropriate rate classification or rate structure for "those telephone lines required by regulation or code for safety or emergency use, such as telephone lines required to be located in elevators or in proximity to swimming pools."[2] This issue originally arose when a member of the Bay Meadows Homeowners Association ("HOA") filed a complaint with the Commission because HTC charges business rates for lines that serve telephones in elevators and at the swimming pool at a condominium development located in HTC's service area.[3] After holding an evidentiary hearing in that docket, the Commission entered an order establishing the existing generic docket.[4]

The Commission received pre-filed testimony in this docket on March 23, 2005 and presided over a hearing on April 13, 2005. Only one party, Mr. Rufus S. Watson, Jr, asked the Commission to change the *status quo* and to rule that residential rates should apply to the types of lines addressed in this docket. Mr. Watson is a resident of the condominium development, but he is not personally responsible for the telephone service

---

[2] *See* Revised Notice of Filing and Hearing issued in this docket January 31, 2005. *See also* Order Holding Disposition in Abeyance and Creating Generic Docket, *In Re: Rufus Watson, Bay Meadows Homeowners Assn. v. Horry Telephone Cooperative*, Order No. 2004-466 in Docket No. 2003-221-C at p.7 (October 5, 2004) ("HTC Order")("A generic docket is established to address the appropriate rate classification or rate structure for telephone lines which are required by code or regulation for safety or emergency use, such as telephone lines located in elevators and in proximity to swimming pools.").

[3] *See* HTC Order at pp. 1-4.

[4] *Id.* at 7.

at the pool and elevators in the development. Instead, the bill for those lines is in the name of the HOA.[5] Mr. Watson is not on the HOA's board of directors,[6] and neither the HOA itself, any of its directors, nor any other resident of the condominium development participated in this docket.

Every other witness who testified in this proceeding supported the *status quo* of applying business rates when homeowners associations like the one at issue in this docket purchase telephone lines at pools and elevators in the common areas of a condominium development. These witnesses testified on behalf of the Office of Regulatory Staff ("ORS"), Verizon, HTC, the SCTC, United Telephone Co. of the Carolinas and Sprint Communications Co. (collectively "Sprint"), and BellSouth.

For the reasons set forth below, the Joint Intervenors respectfully request that the Commission enter an order consistent with the testimony of the ORS and the industry witnesses.

II. ARGUMENT

The facts of record, South Carolina court decisions, decisions from at least two other State commissions, and the public interest all support the *status quo* of applying business rates when homeowners associations like the one at issue in this docket purchase telephone lines at pools and elevators in the common areas of a condominium development.

---

5 Tr. at p. 21, ll. 6-12.

6 Tr. at p. 22, ll. 21-22.

A. The Facts of Record Support the Status Quo of Applying Business Rates to the Lines at Issue in this Docket.

The HOA, and not any particular individual, is the entity that receives telephone service at the swimming pool and at the elevators in the condominium development.[7] The HOA is "organized as a non-profit corporation."[8] Clearly, it is a corporate business entity and not an individual.

In its capacity as a corporate business entity, the HOA provides a variety of services to the residents of the condominium development. These services include obtaining telephone lines for the pool and elevators, as well as obtaining insurance, sewer service, water service, electric service, and grounds-keeping service with regard to the common areas of the development.[9] In fact, the business the HOA conducts for the residents of the development is substantial enough that the HOA has hired a management agent that handles its affairs.[10] In exchange for these services it provides, the incorporated HOA collects $195 per month from each unit in the development.[11]

Significantly, the residents of the condominium complex benefit from the fact that the HOA is an incorporated business entity. If the HOA is sued, for instance, it is the HOA's assets – and not the residents' individual assets – that would be subject to any judgment that might be entered against the HOA. Additionally, condominium homeowners associations that are organized as not-for-profit corporations enjoy the

---

7 *See* HTC Order at 3; Tr. at p. 21., ll. 7-12.

8 HTC Order at 3 (emphasis added). Tr. at p. 21, ll. 23-24.

9 Tr. at p. 23, l. 25 through p. 24, l. 2; p. 27., ll. 11-21.

10 Tr. at p. 25, l. 23 through p. 26., l. 1. This likely is one reason the HOA requested an unlisted number from HTC – since it has hired an agent to conduct much of its business, it makes sense for people to call the agent and not the HOA to conduct that business. The fact that the HOA has elected to hire an agent for this purpose, however, does nothing to change the fact that the HOA is performing business services for the individuals who reside at the condominium development.

11 Tr. at p. 27, ll. 11-14.

benefits conferred upon business organizations by the Chapter 11 bankruptcy laws.[12] In this docket, a resident of the complex, who enjoys the protection the business status of the HOA provides, is asking that the HOA be treated as a non-business when it purchases telephone service for the pool and elevators at the complex. This self-serving request is illogical, and thus should be denied.

Moreover, the types of telephone lines at issue serve common areas, not any individual residence.[13] Accordingly, the pool does not meet the applicable definition of a residential pool, and the elevators do not meet the applicable definition of a residential elevator.[14] These facts further support a determination that the HOA should continue paying business rates for the line serving the pool and for the lines serving the elevators.

Finally, the tariffs of the local exchange companies that participated in this proceeding generally provide that business rates apply when service is used for a business purpose.[15] Associations like the HOA (which, as explained above, are corporate business entities) order telephone service in common areas like elevators and swimming pools for a business purpose. That business purpose is to enhance the safety and security of people in those common areas, regardless of whether these people are residents, guests, trade persons, or employees of a homeowners' association. Because these associations use these telephone lines to fulfill their legal, insurance and safety obligations -- not to provide residents with an alternate source of residential telephone service -- it is appropriate to

---

[12] *See, e.g., In Re: SABTC Townhouse Ass'n*, 152 B.R. 1005 (Bkrtcy. M.D. Fl. 1993).

[13] Tr. at p. 23, l. 7; p. 26, ll.17-24.

[14] This is explained in more detail in BellSouth's Pre-Hearing Brief, a copy of which is attached as Exhibit A.

[15] Testimony of BellSouth witness Carlos Morillo, Tr. at p. 120, l. 14 through p. 121, l. 11; Testimony of Verizon Witness Orville Fulp, Tr. at p. 61, l. 21 through p. 62, l. 18; Testimony of HTC/SCTC Witness Debby Brooks, Tr. at p. 76, l. 15 through p. 77, l. 9; Testimony of Sprint Witness John Mitus, Tr. at p. 102, l. 6 through p. 103, l. 22.

charge business rates for these services.

Accordingly, the Commission should maintain the *status quo,* and rule that business rates should be applied to phones in elevators and near swimming pools.

B. South Carolina Court Decisions Support the Status Quo of Applying Business Rates to the Lines at Issue in this Docket.

The South Carolina Court of Appeals treats condominium owners' associations as business entities, holding that the business judgment rule applies to their decisions:

> A court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation. This is especially true where the action taken by the governing board of a non-profit corporation requires the board's business judgment. In such instances, the governing board is entitled to have the validity of its *intra vires* action tested by the "business judgment" rule. Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.[16]

On appeal, the Supreme Court of South Carolina affirmed this decision.[17] Later, the Supreme Court considered the duty a developer owed to a condominium owners' association that "was responsible for maintaining all common areas within" a planned unit development.[18] In rendering its decision, the Supreme Court cited with approval an Illinois decision holding that a developer "had the duty not to hinder 'the ability of the [condominium owners' association] to continue the business for which it was developed.'"[19] These South Carolina court decisions, which treat condominium owners' associations as business entities, support the *status quo* of applying business rates to the lines at issue in this docket.

---

16 *Dockside Ass'n v. Detyens*, 352 S.E.2d 714, 716 (S.C. Ct. App. 1987).

17 *See Dockside Assoc. v. Detyens*, 362 S.E.2d 874 (S.C. 1987).

18 *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp*., 562 S.E.2d 633, 636 (S.C. 2002).

19 *Id.* at 637 (emphasis added).

C. Decisions of the Florida and California Commissions, as well as the Practice in at Least Seven Southeastern States, Support the Status Quo of Applying Business Rates to the Lines at Issue in this Docket.

In 1994, the Florida Public Service Commission entered a Final Order in a generic proceeding it opened to investigate the proper tariffing of telephone service for elevators and common areas within condominium and similar facilities.[20] The Florida Commission found "that [local exchange companies] should be allowed to continue applying business rates to telephones located in condominium elevators."[21] The Florida Commission stated that while calls made with these telephones likely would be made primarily by condominium residents, "condominium associations use elevator phone service to fulfill legal obligations and enhance the safety of condominium residents," including "meeting the requirement of installing a communications device in an elevator."[22] The Florida Commission found that "[t]his is a business activity and business rates should apply to a switched telephone line," and it further found that "condominium residents can receive residential rates in their units but an elevator is not a residential facility."[23]

In 1990, the California Public Utilities Commission reached a similar conclusion in a proceeding in which the owners' association of a condominium complained that a local exchange company charged business rates for telephone lines in an elevator that connected solely to an alarm company and could not be used for any other purpose.[24] The California

---

[20] *See* Final Order, *In Re: Investigation into proper tariffing of telephone service for elevators and common areas within residential facilities*, Order No. PSC-94-1180-FOF-TL in Docket No. 920837-TL (September 27, 1994). Exhibit CRM-2 to Mr. Morillo's testimony is a copy of this decision.

[21] *Id.* at 7.

[22] *Id.*

[23] *Id.*

[24] *See* Opinion, *St. Francis Gardens Owners Assoc. v. General Telephone Co.*, Decision No. 91-04-056 in Case No. 90-12-020 (December 10, 1990). Exhibit CRM-3 to Mr. Morillo's testimony is a copy of this decision.

Commission dismissed the Complaint, saying that "[e]levator emergency telephone service to an alarm company is a business usage."[25]

Finally, ORS witness James McDaniel testified that the Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, and Tennessee Commissions responded to an ORS survey.[26] Each of these seven Commissions indicated that business rates apply for the types of lines at issue in this matter in their respective states.[27]

D. The negligible financial benefit condominium residents might receive if the lines at issue were reclassified is outweighed by the harm to the public interest that would result from such a reclassification.

The condominium development discussed in this docket consists of eight buildings with a total of ninety-six residential units.[28] HTC's witness testified that the difference between its residential rate and its business rate is "approximately $10 per phone line per month."[29] Given the eight lines at issue (one for the pool and seven for elevators), and given the ninety-six units at the development, reclassifying the lines at issue in this docket could possibly reduce each unit's $195.00-per-month regime fee by approximately $0.83 per month ($80 per month ÷ 96 units). This is a reduction of less than one-half of one percent of the existing regime fee. This, of course, assumes that the HOA would actually pass the benefits of any reduced telephone rates along to the residents in the form of a one-for-one reduction in the regime fees. Given that the HOA was not a party to this docket, the record contains no evidence to support this assumption.

---

25 Id. at p.2, Finding of Fact No. 4.

26 Tr. at p. 38, ll. 16-18. The Louisiana Commission did not respond to the ORS's survey. *Id.* at ll. 18-19.

27 *Id.* at ll. 23-24.

28 Tr. at p. 14, ll.10-12.

29 Tr. at p. 92, ll.19-23.

The Commission, therefore, should not base any decision it makes in this docket on such an assumption.[30]

This negligible financial benefit to residents of a coastal condominium development is outweighed by the harm to the general public that would result if these lines were reclassified. As witnesses for the ORS,[31] Verizon,[32] HTC,[33] the SCTC,[34] and Sprint[35] all noted during the hearing, reclassifying these lines on a generic basis would, depending on the local exchange carrier involved, either convert above-cost rates to below-cost rates or take rates that are already below cost and force them even further below cost.[36] As the Commission is aware, any requirement to offer service at below-cost prices raises numerous and contentious legal and policy issues, and the General Assembly of South Carolina currently is considering these issues in relation to the State USF. Reclassifying the lines at issue in this docket would only exacerbate these issues.[37]

This negligible financial benefit also would be outweighed by the significant

---

30 *See, e.g., Gosnell v. Department of Highways*, 320 S.E.2d 454, 457 (S.C. Ct. App. 1984)("verdicts may not be permitted to rest upon surmise, conjecture, or speculation.").

31 Testimony of ORS Witness James McDaniel, Tr. at p. 37, ll. 1-8.

32 Testimony of Verizon Witness Orville D. Fulp, Tr. at p. 63, ll. 1-12.

33 Testimony of HTC/SCTC Witness Debby Brooks, Tr. at p. 78, l. 5 through p. 79, l.10.

34 *Id.*

35 Testimony of Sprint Witness John Mitus, Tr. at p. 104, ll. 1-22.

36 This also is the case for BellSouth – as the Commission is aware from the evidence BellSouth has presented and from the Orders the Commission has entered in the State USF docket (1997-239-C), BellSouth's residential rates are priced below their cost.

37 Moreover, many communications service providers (such as wireless, satellite, and cable companies) would not be subject to any reclassification ordered by the Commission. Moreover, as a practical matter, competitive local exchange carriers ("CLECs") could avoid any such reclassification by simply refusing to offer these types of lines because, unlike the Joint Intervenors and other incumbent local exchange companies, CLECs have no carrier of last resort obligations. As a practical matter, therefore, any such reclassification would apply to only one of many groups of providers. It would be inappropriate and inequitable to require one, and only one, of the many groups of providers in this competitive market to reclassify these types of lines.

operational and financial concerns facing local service providers. The evidence shows that most local exchange companies have no reason to (and thus do not) keep track of the number of lines that serve pools and elevators.[38] It stands to reason, however, that there are enough pools and elevators in the State that reclassifying these lines could have a significant adverse financial impact on local exchange companies in the aggregate[39] – an impact that will have to be shouldered by other ratepayers either directly by way of rate increases or indirectly by way of funding additional withdrawals from the State USF.

These concerns are further compounded when the potential domino effect of such a reclassification is considered. If an incorporated HOA that obtains insurance, sewer service, water service, electric service, and grounds-keeping service with regard to the common areas of a coastal condominium development is entitled to below-cost residential rates, what is to stop other business concerns from requesting similar treatment for the same or similar reasons? The Joint Intervenors respectfully request that the Commission avoid this slippery slope and confirm the *status quo* of applying business rates when homeowners associations like the one at issue in this docket purchase telephone lines at pools and elevators in the common areas of a condominium development.

---

[38] *See* Pre-Filed Testimony of BellSouth Witness Carlos Morillo at p. 11, ll. 12-14. *See also* Tr. at p. 72, ll. 11-17; p. 92, l. 19 through p. 93, l. 6; p. 107, l. 19 through p. 108, l. 5.

[39] *See* Tr. at p. 92, l. 25 through p. 93, l. 6. (HTC's witness testified that "the financial impact that where Bay Meadows may be a small part, the basis that we are by law required to provide services on a nondiscriminatory basis. We can't single out one aspect, so the financial impact would be substantial because there are a lot of other situations, lot of other pools and elevators within our county service area.").

III. CONCLUSION

The facts of record, South Carolina court decisions, decisions from at least two other State commissions, and the public interest all support the *status quo* of applying business rates when homeowners associations like the one at issue in this docket purchase telephone lines at pools and elevators in the common areas of a condominium development. The Joint Intervenors, therefore, respectfully urge the Commission to enter an Order to the effect that a business classification is appropriate for these types of lines.

Respectfully submitted this 11th day of May, 2005.

_____

Patrick W. Turner
1600 Williams Street, Suite 5200
Columbia, South Carolina 29201
(803) 401-2900

ATTORNEY FOR BELLSOUTH TELECOMMUNICATIONS, INC.

_____

M. John Bowen, Jr.
Margaret M. Fox
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Telephone: (803) 799-9800

ATTORNEYS FOR HORRY TELEPHONE COOPERATIVE, INC. AND THE SOUTH CAROLINA TELEPHONE COALITION

_____

Steven W. Hamm
RICHARDSON PLOWDEN CARPENTER
& ROBINSON, P.A.
P. O. Box 7788
Columbia, SC 29202
(803) 771-4400 Ext. 3004 (telephone)

ATTORNEY FOR VERIZON SOUTH,
INC.